Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-306

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Milton Everest Mitchell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 7, 1976.

Opinion Below

The Court of Appeals did not render any opinion in this case, except an unreported memorandum set forth in the judgment of this case, which is reprinted herein as Appendix "A", infra.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1976. A timely petition for rehearing and for rehearing *en banc* was denied on June 2, 1976. On August

5, 1976 a motion to reconsider such denial was likewise denied. The judgment of the Court of Appeals and the orders denying rehearing and rehearing *en banc* are reprinted as Appendix "A", *infra*. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. Whether, under the mandate in 8 U.S.C. § 1105(a)(4), that deportation orders be reviewed for substantiality of supporting evidence in the record as a whole, petitioner's deportation order, for "entry without inspection upon a false claim of citizenship", should have been reviewed through consideration of all available evidence, which petitioner cited to show that his claim of citizenship was not accepted and did not defeat the inspection process required for aliens.

2. Whether findings of fact articulated as the basis for a discretionary denial of voluntary departure in lieu of deportation, are reviewable by the substantial evidence standard of 5 U.S.C. § 706(2)(E); since such denial, a part of the "deportation order" mentioned in 8 U.S.C. 1105(a)(4), is provided by § 1254(e) to be made in the deportation hearing.

Constitutional Provision Involved

AMENDMENT V

"No person shall • • • be deprived of life, liberty, or property, without due process of law. • • •"

Statutes and Regulations Involved

The statutes involved are the Immigration and Nationality Act (Title 8, United States Code) and the Administrative Procedure Act (Title 5, United States Code, § 551,

et seq.). The relevant provisions are 8 U.S.C. § 1105(a)(4), § 1251(a)(2) and (f), § 1254(e); and 5 U.S.C. § 706(2)(A) and (E). Since these provisions are lengthy, their pertinent text is set forth as Appendix "B", infra, p. B-1 to B-3. The regulation involved is Title 8 CFR Part 235.1(b), which is also reprinted as part of Appendix "B", infra, p. B-4

Statement of the Case

Milton Everest Mitchell seeks review of a memorandum judgment of the Court of Appeals for the Second Circuit which upheld a final order of deportation of the Board of Immigration Appeals.

The Facts

Petitioner, Milton Everest Mitchell, is a 38-year old alien, native and citizen of Trinidad. He is the husband of a United States citizen and the father of two United States citizen children. Petitioner first entered the United States in 1960, with a visitor's visa, and except for a short departure and return in 1961, had resided continuously in the United States for more than thirteen years, before going to Canada in 1974, on a week-end trip to participate in a well-known Caribbean festival. However, during this thirteen-year period petitioner had never adjusted his status under benefits available to long-term out-of-status residents; nor did he apply for immigrant status through a petition filed on his behalf by an immediate relative United States citizen.

On August 5, 1974, petitioner without any luggage and in a Canadian taxicab presented himself for immigration inspection at the Rainbow Bridge, in Niagara Falls, New York, indicating that he had spent a three-day week-end in Toronto, Canada, and that he was on his way to his home in New York City. Petitioner stated that he was Wesley Oliver, a citizen of the United States, and except

for a birth certificate in the name of Wesley Oliver, petitioner had no other form of identification. Two immigration inspectors and a Border Patrol Agent questioned petitioner intently for over an hour about his identity, his claim of United States citizenship, his having no luggage and his having only the birth certificate of Wesley Oliver. After petitioner explained that he was going to board a Greyhound bus and continue on to his home in New York City, he was permitted to proceed to the bus station which was 500 yards distant from the inspection station.

However, at that very moment petitioner was put under immediate and continuous surveillance for six hours by the Border Patrol Agent. The surveillance began at on or about 10:30 a.m. and terminated at 5:00 p.m. when petitioner was arrested by the Border Patrol Agent, who had with him a Warrant of Arrest and deportation charges in the form of an "Order to Show Cause", already drawn up at 4:00 p.m. The arrest occurred at the bus station in the immediate vicinity of the port of entry, where petitioner had remained during the entire six-hour surveillance period.

Chronology of Proceedings Below

On August 6, 1974 petitioner was given a deportation hearing under a charge that he had entered the United States without inspection upon a false claim of citizenship. [8 U.S.C. § 1251(a)(2)]. Petitioner was not represented by counsel at these proceedings. At that hearing, his pleading to the charge consisted of only an admission that he had claimed American citizenship during the initial questioning at the border. There was never any mention made concerning the initial doubts of his claim of United States citizenship during the hour-long investigation and interrogation to which he had been subjected, or the continuous six-hour surveillance culminating in his arrest under already prepared deportation charges. Petitioner conceded deportability and he was found deportable as charged.

Following the determination that deportability was established, petitioner was advised by the immigration judge to apply for voluntary departure in lieu of deportation. In the part of the hearing devoted to this question, the immigration trial attorney and the immigration judge took petitioner to task for being in the company of females other than his wife, on a trip on which he did not take his wife; and the immigration judge proceeded to make a finding that petitioner "probably" committed adultery on the holiday week-end, notwithstanding his specific denial of such conduct. The immigration judge also took petitioner to task for having a lawyer apply for an extension of time to file a then current income tax return and proceeded to construe such application, and petitioner's buying of an expensive automobile, as a wilful failure to pay current income taxes. Added to these "findings" of ineligibility for voluntary departure was the element that petitioner deliberately sought re-entry into the United States through the fraudulent use of another's birth certificate, which itself, was a prime element of deportability under 8 U.S.C. § 1251(a)(2). In favor of petitioner's application for relief were the elements of his being the husband of a United States citizen, his being the father of two United States citizen infant children, and his continuous United States residence for over thirteen years. However, the foregoing three adverse "factors" alleged to exist were deemed to outweigh the favorable factors.

Voluntary departure in lieu of deportation was denied by the immigration judge and an appeal against this denial was timely filed with the Board of Immigration Appeals. However, while the appeal was pending there was merged into it a request for relief of statutory waiver of deportation under 8 U.S.C. § 1251(f), pursuant to the law as it existed before this Court's decision in *Reid* v. *INS*, 420 U.S. 619 (1975). Oral argument before the Board was limited to the issue of voluntary departure, with leave to

submit supplemental arguments on the request for relief under 8 U.S.C. § 1251(f), on the issue then pending before this Court. *Reid* was decided by this Court during the pendency of this case.

Those supplemental arguments were submitted, but only as being contingent upon the outcome of a separate request for the separate relief of non-deportability, pursuant to the guidelines set down in *Reid*. *Reid* held, in effect, that deportability is established for "entry without inspection upon a false claim of citizenship", when the accepted claims of citizenship *defeats* the inspection process for aliens. Petitioner asked for a reopening of proceedings so that he could establish that his claim of citizenship did not defeat full inquiry as to his admissibility as an alien, and therefore, that he was not deportable for "entry without inspection" within the meaning of this Court's decision in *Reid*. The new evidence submitted was contained in an affidavit of the Border Patrol Agent and was supplemented by affidavits of petitioner and Patsy Gully, one of two females mentioned in the Border Patrol Agent's affidavit.

The Board affirmed the denial of voluntary departure, and rejected petitioner's argument that if he could establish that the inspection process was not frustrated through his claim of citizenship, he could establish thereby that he was not deportable as charged. Contingent relief for statutory waiver of deportation under 8 U.S.C. § 1251(f), was also denied because of its unavailability to persons found deportable for entry without inspection upon a false claim of citizenship.

Petitioner then petitioned for review in the Court of Appeals, requesting a remand to the administrative authorities for redetermination of the issues, alleging that there was a lack of substantial evidence in the record to sustain deportability for entry without inspection, as well as a lack of substantial evidence to sustain the findings articulated as the basis for denying voluntary departure in lieu of deportation.

Reasons for Granting the Writ

This case presents two important issues concerning judicial review of administrative findings of fact, issues which previously have not been, but should now be, resolved by this Court.

The first issue raises the question of whether the Courts of Appeals must consider all available evidence cited to show non-deportability, in order to carry out the statutory mandate that deportation orders be reviewed for substantiality of supporting evidence in the record as a *whole*. The second issue is broader based and in the general context of the Administrative Procedure Act, raises the question of whether 8 U.S.C. § 1254(e), provides for discretionary grants of voluntary departure in lieu of deportation to be made in the deportation hearing; and whether, by reason of such provision, and notwithstanding the discretionary nature of the determination, there must nonetheless be substantial evidence in the record to support those findings of fact articulated as the basis for exercising discretion. In the narrower context of judicial review under the Immigration and Nationality Act, this second issue may be stated in terms of whether the scope of review applicable to *findings of fact* supporting the deportation order is uniformly applicable to all constituent elements of the deportation order, including denials of discretionary relief as well as rulings as to deportability.

While the first issue may be regarded as being of principal significance to deportation proceedings under the Immigration and Nationality Act, the second issue appears to be of broader significance in other areas of administrative law, where conflicts arise over whether to apply the "substantial-evidence" or the "abuse of discretion" standard of review, or both.

Since under the "due process" provisions of the United States Constitution, the substantial-evidence standard of

review operates to insure the integrity of the fact-finding phase of administrative determinations, provided by statute to be made in adjudicatory hearings, these issues may also involve the constitutional question of whether there is a denial of due process of law as to persons against whom administrative orders are affirmed upon review, wherein there was meaningful misapplication or misapprehension of the substantial-evidence standard of review.

I.

The Court of Appeals meaningfully misapplied the substantial-evidence standard of review when it did not consider all of the evidence of non-deportability.

Pursuant to the guidelines laid down by this Court in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951), proper application of the substantial-evidence standard of review to administrative orders made in adjudicatory hearings, requires that Courts of Appeals take into account whatever in the record fairly detracts from the weight of evidence supporting such orders. The Court of Appeals meaningfully misapplied the above formula in this case.

The Court of Appeals in reviewing petitioner's deportation order for "entry without inspection upon a false claim of citizenship" decided that it found unpersuasive the argument that because the immigration authorities were skeptical and questioned petitioner, he had the functional equivalent of an inspection. (Appendix A-1).

The skepticism of immigration officials and their questioning of petitioner at the border was but a single portion of the evidence detracting from petitioner's deportability, and was cited for the limited purpose of establishing that such questioning and skepticism was the significant first step in an inspection as an alien, within the meaning of immigration regulations at 8 CFR Part 235.1(b). Under these regulations, an inspection as an alien *commences*

when an applicant for entry into the United States fails to satisfy the examining officer that he is a United States citizen.

In addition to the above, petitioner had cited from the administrative record other "detracting" evidence. This evidence consisted of (a) the six-hour surveillance within the inspection station area to which petitioner had been subjected by one of the officers who originally questioned him; (b) petitioner's arrest within the inspection station area by the same officer surveilling him and with deportation charges prepared at least an hour prior to his arrest; (c) the serious conflict as to whether, as alleged by respondent in its brief, petitioner's alienage and true identity were first known *after* his arrest at 5:00 p.m.; or whether, as contended by petitioner in his reply brief, the immigation authorities were satisfied *during* initial examination that petitioner was an alien and not the citizen he claimed to be; and that the decision to let him proceed to the bus station was for the purpose of putting him under surveillance and did not constitute either an acceptance of his citizenship claim or an entry.

Upon the basis of all the "detracting" evidence, petitioner requested the Court of Appeals to remand his case to the administrative authorities so that at a reopened hearing, a redetermination of deportability could be made, pursuant to the "clear, convincing and unequivocal standard" of *Woodby* v. *INS,* 385 U.S. 276 (1966).

However, as is evidenced from the memorandum decision, at Appendix A-1, it appears that the Court of Appeals, contrary to the mandate of 8 U.S.C. § 1105(a)(4), reviewed the evidence of deportability through consideration of only one portion of the "detracting" evidence, which petitioner had cited to show his possible non-deportability. Under 8 U.S.C. § 1105(a)(4), deportation orders must be reviewed for substantiality of supporting evidence in the

record as a *whole*. Petitioner's deportation order should have been reviewed through consideration of not only the fact that the immigration officials were skeptical and questioned petitioner at the border; review should also have been made through consideration of all other available "detracting" evidence which petitioner cited to show that his claim of citizenship was not accepted; and that such claim did not defeat the inspection process required of aliens; and accordingly that he was not deportable for entry without inspection, within the meaning of *Reid, supra.*

Petitioner submits that where the Court of Appeals considered only one of the many submitted items of "detracting" evidence of non-deportability, such limited consideration, in affirming the deportation order, constituted a meaningful misapplication of the substantial-evidence standard of review mandated by 8 U.S.C. § 1105(a)(4). From the decision of the Court of Appeals at Appendix A-1, it also appears that there is substantial doubt as to whether the Court carried out the general mandate of 5 U.S.C. § 706 that ". . . in making the foregoing determinations the Court shall review the whole record or those parts of it cited by a party . . ."

The above misapplication of the substantial-evidence standard of review appears to fall within this Court's criteria for intervening in this area, which is otherwise the exclusive jurisdiction of the Courts of Appeals. See *Universal Camera Corp.* v. *NLRB, supra; Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283 (1974).

II.

The Court of Appeals misapprehended that the subtantial-evidence standard of review may be applicable to findings of fact supporting some discretionary determinations, if provided by statute to be made in an adjudicatory hearing.

It appears from another memorandum decision of the Court of Appeals, at Appendix A-2, that the findings of fact articulated as the basis for denying petitioner voluntary departure in lieu of deportation, was reviewed by the "abuse of discretion" standard and not by the "substantial-evidence" standard, as requested by petitioner.

Under 5 U.S.C. § 706(2)(E), the substantial-evidence standard of review is applicable not only to determinations mandated by statute to be made in an evidentiary hearing, but also to determinations which are provided by statute to be made in other types of agency hearings. (See Attorney General's Manual on the Administrative Procedure Act (1947) p. 109). It is submitted that provision is made in 8 U.S.C. § 1254(e), for consideration, during the deportation hearing, of applications for voluntary departure in lieu of deportation. Therefore the substantial-evidence standard is applicable within the meaning of 5 U.S.C. § 706(2)(E).

The Immigration and Nationality Act allows for two different forms of discretionary grants of voluntary departure, in 8 U.S.C. § 1252(b) and in § 1254(e) respectively. Pursuant to § 1252(b), an alien may be permitted to depart voluntarily without deportation proceedings. Pursuant to § 1254(e) an alien "under deportation proceedings" may be permitted to depart voluntarily "in lieu of deportation." Available only to aliens who are "under deportation proceedings" for specified grounds of deportability, this latter form of voluntary departure is "in lieu

of deportation'' because, after deportability is established in the deportation hearing, its grant serves to withhold entry of the deportation order by the Special Inquiry Officer. The twin statutory provisions in § 1254(e) of ''in lieu of deportation'' and ''under deportation proceedings'', allow for this form of voluntary departure, to be granted only during the period when the deportation hearing begins and before the deportation order is entered and closes the proceedings. Consequently, the initial decision to grant voluntary departure, which withholds entry of the deportation order, can be made by the Special Inquiry Officer only in the deportation hearing. This construction of § 1254(e), is compatible with its implementation in the immigration regulations under 8 CFR 242.17(b), whereby a Special Inquiry Officer determines in the deportation hearing whether voluntary departure in lieu of deportation should be granted, and whereby the District Director, pursuant to 8 CFR 244.2, considers extensions of the voluntary departure time allotted by the Special Inquiry Officer. Since provision is made in § 1254(e), for consideration during the deportation hearing of applications for voluntary departure in lieu of deportation, such applications are unlike applications for other types of discretionary relief, which are considered during the deportation hearing, perhaps for purposes of administrative efficiency in facilitating disposition of the entire matter at the same time.

In the broader context of general administrative law, decisions of this Court as well as decisions of Courts of Appeals definitively hold that the substantial-evidence standard of review is applicable to determinations mandated by statute to be made in evidentiary hearings, as well as to determinations provided by statute to be made in other types of agency hearings; but such decisions leave unresolved the particular issue raised by this case. See *Citizens to Preserve Overton Park Inc.* v. *Volpe,* 401 U.S. 402 (1971); *Camp* v. *Pitts,* 411 U.S. 138 (1973); *Bowman*

Transportation Inc. v. *Arkansas Best Freight System, Inc.,* 419 U.S. 281 (1975); *National Nutritional Foods Ass'n.* v. *Weinberger,* 512 F.2d. 688 (1975). The determination at issue in this case is one which, in addition to being provided by statute to be made in an agency hearing, is also committed to agency discretion by the same statute. Under such statutory scheme, does the "abuse of discretion" standard prevail over the otherwise applicable ''substantial-evidence" standard? Petitioner submits that as to findings of fact, made in an agency hearing provided for by statute, they are reviewable by the substantial-evidence standard, quite apart from whether or not there was any abuse in connection with exercising discretion.

In the narrower context of Immigration and Nationality law, the specific issue now raised by petitioner has not previously been, but should now be, resolved by this Court. Before enactment in 1961 of 8 U.S.C. § 1105(a), and on the closely related question of whether a discretionary denial of suspension of deportation could be based upon evidence not in the record of the deportation hearing, this Court held that the suspension of deportation statute, 8 U.S.C. § 1254(a), makes no provision for applications for suspension of deportation to be considered in the deportation hearing, and that the discretion of the Attorney General was unfettered. However, this decision in the context of the Administrative Procedure Act does not appear to dispose of the issue now raised by petitioner. [See *Jay* v. *Boyd,* 351 U.S. 345 (1956)]. After enactment of 8 U.S.C. § 1105(a) this Court, in *Foti* v. *INS,* 375 U.S. 306 (1963), without deciding this issue, commented at pp. 313-314, that the substantial-evidence scope of review found in § 1105(a)(4), may be limited to adjudications of deportability and may not be applicable to denials of discretionary relief from deportation wherein judicial review is "concededly limited to determinations of whether there has been any abuse of administrative discretion."

This case, in effect, squarely presents for decision the collateral issue commented on but not decided by this Court in *Foti* v. *INS, supra.* The subsidiary question presented by this issue is that of whether findings of fact, supporting a denial of voluntary departure in lieu of deportation, may be reviewed by the substantial-evidence standard mandated by 8 U.S.C. § 1105(a)(4) for findings of fact supporting deportation orders, since under the authority of *Foti* a denial of discretionary relief is a reviewable "deportation order" within the meaning of § 1105(a). The term "deportation order" is not to be equated with, and limited to, the finding as to deportability. Denial of voluntary departure in lieu of deportation is, in effect, entry of the deportation order. As such, this form of discretionary relief is, among others, the most intimate constituent element of the deportation order.

It is submitted that a denial of voluntary departure in lieu of deportation is reviewable by the substantial-evidence standard of § 1105(a)(4), with respect to the *findings of fact* articulated as the basis for denial. However, the denial itself, supported by such findings, is reviewable by the "abuse of discretion" standard.

The above construction of 8 U.S.C. § 1105(a)(4), appears to reflect a specific application, in the field of Immigration & Nationality Law, of the overall provision of the Administrative Procedure Act in 5 U.S.C. § 706(2)(E), that the acid test for applicability of the substantial-evidence standard is that of whether the determination being reviewed was provided by statute to be made in an agency hearing.

CONCLUSION

For all the foregoing reasons petitioner prays that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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August 25, 1976

APPENDIX "A"

Order Denying Petition for Review by the Court of Appeals.

75-4207

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition to review an order of the Board of Immigration Appeals.

This cause came to be heard on the administrative record of the Immigration and Naturalization Service and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the petition for review is denied on the authority of *Reid* v. *I.N.S.*, 420 U.S. 619 (1975) and *Pereira-Barreira* v. *U.S. Dept. of Justice*, 523 F.2d 503 (2d Cir. 1975). We find unpersuasive the argument that because the immigration authorities were skeptical and questioned petitioner, he had the "functional equivalent of inspection." We have examined *in camera* an intra-agency report as requested by petitioner's counsel and find that the non-disclosure thereof at the hearing in no way affected petitioner's rights.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS

April 7, 1976

Order Denying Motion to Recall Mandate.

Pursuant to Rule 41(b) F.R.A.P.

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75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of May, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated April 21, 1976 to recall the mandate and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure in the event the petition for rehearing or rehearing en banc is denied be and it hereby is denied, no abuse of discretion being demonstrated in connection with the denial of voluntary departure in lieu of deportation.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of June, one thousand nine hundred and seventy-six.

MITCHELL EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the petitioner, Milton Everest Mitchell, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner, Milton Everest Mitchell,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated August 5, 1976 to reconsider the denial of a petition for rehearing and rehearing *en banc*
be and it hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated August 5, 1976 to reconsider the denial of an application to recall the mandate and stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

APPENDIX "B"

TITLE 5 UNITED STATES CODE

§ 706

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
The reviewing court shall— . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

In making the foregoing determinations, the Court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Appendix "B".

TITLE 8 UNITED STATES CODE

Immigration and Nationality Act

§ 1105a. Judicial review of orders of deportation and exclusion—Exclusiveness of procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, . . .

Determination upon administrative record

(4) except as provided in Clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

§ 1251. Deportable aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

Appendix "B".

§ 1254(e) Voluntary departure

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Appendix "B".

CODE OF FEDERAL REGULATIONS

Title 8

Part 235. Inspection of persons applying for admission.

235.1— Scope of Examination

(a) General . . .

(b) U.S. citizens. A person claiming U. S. citizenship must establish that fact to the examining immigration officer's satisfaction and must present a U. S. passport if such passport is required under the provisions of 22 CFR Part 53. If such an applicant for admission fails to satisfy the examining immigration officer that he is a U. S. citizen, he shall thereafter be inspected as an alien.